Supreme Court, U.S.
FILED
DEC 20 2000
CLERK

Dec 20, 2000

No. 99-1848

IN THE

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC., *et al.*,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MASSACHUSETTS, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MAUREEN M. DOVE
ANDREW H. BAIDA*
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Counsel for *Amici* States

**Counsel of Record*

[additional counsel listed on inside cover]

BEST AVAILABLE COPY

BILL PRYOR
Attorney General of
Alabama
11 South Union Street
Montgomery, AL 36130

BILL LOCKYER
Attorney General of
California
1300 I Street
Sacramento, CA 94244

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman Street
Denver, CO 80203

M. JANE BRADY
Attorney General of
Delaware
820 N. French Street
Wilmington, DE 19801

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

JAMES E. RYAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

CARLA J. STOVALL
Attorney General of Kansas
301 S.W. 10th Avenue
Topeka, KS 66612-1597

RICHARD P. IEYOUB
Attorney General of
Louisiana
301 Main Street, Suite 600
Baton Rouge, LA 70804-
9005

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108-1698

JEREMIAH W. (JAY) NIXON
Attorney General of
Missouri
Supreme Court Building
207 West High Street
Jefferson, MO 65101

JOSEPH P. MAZUREK
Attorney General of
Montana
P.O. Box 201401
215 N. Sanders
Helena, MT 59620-1401

DON STENBERG
Attorney General of
Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

PHILIP T. MCLAUGHLIN
Attorney General of New
Hampshire
33 Capitol Street
Concord, NH 03301

MICHAEL F. EASLEY
Attorney General of
North Carolina
Department of Justice
P.O Box 629
Raleigh, NC 27602-0629

HEIDI HEITKAMP
Attorney General
of North Dakota
600 E. Boulevard
Bismark, ND 58505-0040

BEST AVAILABLE COPY

BETTY D. MONTGOMERY
Attorney General of Ohio
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215

W.A. DREW EDMONSON
Attorney General of
Oklahoma
4545 N. Lincoln Blvd.
Suite 260
Oklahoma City, OK 73105-
3498

HARDY MYERS
Attorney General of Oregon
1162 Court St. N.E.
Salem, OR 97310

D. MICHAEL FISHER
Attorney General of
Pennsylvania
16th Fl., Strawberry Square
Harrisburg, PA 17120

SHELDON WHITEHOUSE
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

CHARLES M. CONDON
Attorney General
of South Carolina
Rembert C. Dennis
Office Building
P.O. Box 11549
Columbia, SC 29211-1549

MARK BARNETT
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
Attorney General of
Tennessee
425 Fifth Avenue North
Nashville, TN 37243-0405

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

MARK L. EARLEY
Attorney General of
Virginia
900 East Main Street
Richmond, VA 23219

QUESTION PRESENTED

After a final order of dismissal that disposes of all claims in a case, may plaintiffs who have not obtained a judgment, consent decree, or settlement agreement be prevailing parties for purposes of obtaining attorneys' fees under federal fee-shifting statutes?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A PARTY WHO DOES NOT OBTAIN EITHER A JUDGMENT, CONSENT DECREE, OR SETTLEMENT AGREEMENT IS NOT A PREVAILING PARTY FOR PURPOSES OF OBTAINING ATTORNEYS' FEES UNDER FEDERAL FEE-SHIFTING STATUTES 3

A. The Rule Applied By The Court Of Appeals To Determine Prevailing Party Status Fully Complies With This Court's Attorneys' Fees Decisions 3

B. The Court Of Appeals' Decision Is Not Contrary To The Legislative History Or Policies Of Fee-Shifting Statutes 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES:

American Council of the Blind of Colorado, Inc. v. Romer, 992 F.2d 249 (10th Cir.1993), *cert. denied*, 510 U.S. 864 (1993) 9

Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975) 10,12

Association for Retarded Citizens of Connecticut v. Thorne, 68 F.3d 547 (2nd Cir.1995) 7

Beard v. Teska, 31 F.3d 942 (10th Cir.1994) 9

Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2nd Cir.1968) 10,11

Board of Education of Downers Grove Grade School v. Steven L., 89 F.3d 464 (7th Cir.1996) 8

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 11

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 14

Brown v. Local 58, Int'l Brotherhood of Electrical Workers, 76 F.3d 762 (6th Cir. 1996) 9

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 12

Craig v. Gregg County, 988 F.2d 18 (5th Cir.1993) ... 8

Farrar v. Hobby, 506 U. S. 103 (1992) 3,4,5,6,7

Foreman v. Dallas County, Texas,193 F.3d 314 (5th Cir.1999), *cert. denied*, 120 S.Ct. 1673 (2000) 8,14

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,120 S.Ct. 693 (2000) 6

Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107 (2nd Cir.1964) 10,11

Hanrahan v. Hampton, 446 U.S. 754 (1980) 4

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4,14

Hewitt v. Helms, 482 U.S. 755 (1987) 4,5,6,12

Kentucky v. Graham, 473 U.S. 159 (1985) 4,13

Kilgour v. City of Pasadena, 53 F.3d 1007 (9th Cir.1995) 9

Kopet v. Esquire Realty Co., 523 F.2d 1005 (2nd Cir.1975) 10,11

Little Rock School District v. Pulaski County Special School District, 17 F.3d 260 (8th Cir.1994) 7

Maher v. Gagne, 448 U.S. 122 (1980) 5,9,10

Marbley v. Bane, 57 F.3d 224 (2nd Cir.1995) 7

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir.1978) 7

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir.1970) 10,11,12
Payne v. Board of Education, 88 F.3d 392 (6th Cir.1996) 9
S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina, 6 F.3d 160 (4th Cir.1993) 3,6,7,13
S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) 3
Rhodes v. Stewart, 488 U.S. 1 (1988) 4,5
Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore.1969) 10,11,12
Tenny v. Brandhove, 341 U.S. 367 (1951) 14
Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782 (1989) 3,4,5
Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir.1970), *cert. denied*, 401 U.S. 911 (1971) 10,11
Zinn v. Shalala, 35 F.3d 273 (7th Cir.1994) 8

STATUTES AND RULES :
15 U.S.C. § 78p(b) 11
42 U.S.C. § 1988 4,6
Sup. Ct. R. 37 1

MISCELLANEOUS:
S.Rep. No. 1011, 94th Cong., 2nd Sess. (1976) ... 10,12
H.R. Rep. No. 1558, 2nd Sess. (1976) 10

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent.

INTEREST OF *AMICI CURIAE*

As institutional defendants in actions brought under a broad range of federal fee-shifting laws, the States have a significant interest in the question whether the catalyst theory is available to establish a plaintiff's status as a prevailing party. The resolution of that question will affect the States in two ways. First, a decision that adopts the standard advanced by petitioners and their *amici* will affect the States financially because it will establish an additional avenue by which plaintiffs may obtain attorneys' fees from public treasuries. Second, and more fundamentally, this case will affect the manner in which government officials exercise core legislative and executive functions if this Court holds that petitioners can establish prevailing party status by showing that their suit was the catalyst for the statutory change that rendered their action moot. Allowing fees in such circumstances will inevitably influence the manner in which public officials amend law and policy, and will in many circumstances demand that the legislative branch of government explain to the judicial branch the motivations behind the legislature's exercise of its law-making authority. The outcome of this case, therefore, will have a direct impact on State government.

SUMMARY OF ARGUMENT

The decision of the court of appeals should be affirmed because the court committed no error in holding that a plaintiff is not a prevailing party for the purpose of an award of attorneys' fees in the absence of a judgment, consent decree, or judicially enforceable settlement agreement. This Court has consistently held that an award of fees is improper unless the plaintiff obtains a change in his or her legal relationship with the defendant. In stating that prevailing party status is contingent on the existence of

a judgment, consent decree, or settlement agreement, the court of appeals in this case has merely identified the bright-line criteria it uses for determining whether a material change in the legal relationship has occurred that would give rise to a fee award. Those criteria are proper because they ensure that a party can prevail only if that party secures relief through the courts.

A change in policy, law, or regulation achieved through any other forum is not the type of change upon which a party can rely to establish prevailing party status in litigation, as a party should not be awarded fees from the judicial system for change effectuated through actions undertaken before and by the legislative or executive branches of government. On a technical level, the party against whom fees are sought is frequently not even the party who caused the change through the non-judicial process, and it is just as frequently difficult, if not impossible, to ascertain the motivations of the legislature or the executive branch, each of which is subject to multiple legitimate influences, concerns, and interests. From a substantive standpoint, such motivations should not provide the basis for a fee award, as government officials should be able to freely exercise their legislative and executive functions to advance the public interest, unencumbered by the fear of exposing themselves and their government processes to the disruptive and highly intrusive burden of attorney fee litigation. Attorneys' fee-shifting statutes were simply not intended to fund public policy changes that are accomplished through traditional political operations. The decision below should accordingly be affirmed.

ARGUMENT

A PARTY WHO DOES NOT OBTAIN EITHER A JUDGMENT, CONSENT DECREE, OR SETTLEMENT AGREEMENT IS NOT A PREVAILING PARTY FOR PURPOSES OF OBTAINING ATTORNEYS' FEES UNDER FEDERAL FEE-SHIFTING STATUTES

A. The Rule Applied By The Court Of Appeals To Determine Prevailing Party Status Fully Complies With This Court's Attorneys' Fees Decisions.

The standard that the court of appeals used in this case in determining petitioners' fee eligibility should be affirmed because the application of that standard demonstrates that petitioners have failed to identify any significant change in their legal relationship in their litigation with West Virginia giving rise to a fee award. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989). As this Court recognized in *Farrar v. Hobby*, 506 U. S. 103 (1992), "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 113. Citing this language, the court of appeals in its *en banc* decision in *S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (adopting Judge Wilkinson's dissenting opinion in 6 F.3d 160, 168 (4th Cir.1993), *cert. denied*, 513 U.S. 876 (1994)), identified three ways in which it is possible to change the legal relationship of parties in litigation: by judgment, consent decree, or settlement agreement enforceable by a court. The

synthesis of this Court's decisions discussed in *Farrar* and *S-1* on the issue of prevailing party status demonstrates how this precedent not only supports, but foreordains and requires the conclusion that the court of appeals reached in this case.

In its review in *Farrar* of its prior attorneys' fees decisions, this Court quoted *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980), for the proposition that "Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits." 506 U.S. at 109. To qualify for attorneys' fees, therefore, the party must have prevailed on a merits issue, not a mere procedural point. Observing that in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court accepted a "generous formulation" of the term "prevailing party," and held that one could prevail for purposes of attorneys' fees by succeeding on any significant issue in litigation that achieved some of the benefits sought, the Court in *Farrar* also noted the confirmatory language in *Kentucky v. Graham*, 473 U.S. 159 (1985), that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, §1988 does not authorize a fee award against that defendant." *Farrar*, 506 U.S. at 109 (quoting *Graham*, 473 U.S. at 165).

After discussing these cases, the Court in *Farrar* reviewed what were, at the time, its three most recent prevailing party decisions: *Hewitt v. Helms*, 482 U.S. 755 (1987); *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam); and *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989). *Hewitt* clarified that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," and that to obtain fees, the plaintiff must "prove 'the settling of some dispute which affects the behavior of the defendant towards the plaintiff.'"

Farrar, 506 U.S. at 110 (quoting *Hewitt*, 482 U.S. at 760, 761). *Rhodes* further elaborated on the definition of "relief" by holding that a declaratory judgment finding a violation of federal law is not enough and that "a judgment – declaratory or otherwise – 'will constitute relief . . . if, and only if, it affects the behavior of the defendant toward the plaintiff." *Farrar*, 506 U.S. at 110 (quoting *Rhodes*, 488 U.S. at 4). Finally, *Texas Teachers* "synthesized the teachings of *Hewitt and Rhodes,*" *Farrar*, 506 U.S. at 111, by holding that "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* (quoting *Texas Teachers*, 489 U.S. at 792).

Concluding its review of its attorneys' fee jurisprudence on prevailing party status, this Court stated:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra*, 482 U.S., at 760, 107 S.Ct., at 2675, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *See Hewitt, supra*, 482 U.S., 764, 107 S.Ct., at 2677. Otherwise the judgment or settlement cannot be said to 'affec[t] the behavior of the defendant towards the plaintiff.' *Rhodes, supra*, 488 U.S., at 4, 109 S.Ct., at 203. Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. *Garland, supra*, 489 U.S., at 792-

> 793, 109 S.Ct., at 1494. In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar, 506 U.S. at 111.

Even though, as this Court recently pointed out, *Farrar* "involved no catalytic effect," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 711 (2000), the court of appeals' reliance in *S-1* on this language in *Farrar* does no more than state the three ways in which it is possible to change the legal relationship in litigation: by judgment, consent decree, or judicially enforceable settlement agreement. Contrary to some analyses, this is not a startling new concept, nor does it disregard any of this Court's precedents. Indeed, this Court had never defined the outer boundaries of the term "prevailing party." Rather, in the only case in which it was faced with the question of whether a party who claimed his litigation was the catalyst to change and was therefore a prevailing party, this Court specifically withheld opinion on the issue, stating that "[w]e need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under § 1988...." *Hewitt*, 482 U.S. at 762.

In reserving judgment in *Hewitt* on the possibility of such a fourth avenue for obtaining fees, this Court observed that a fee award could be justified if the lawsuit produced a voluntary change in conduct by a defendant. 482 U.S. at 760-61. As Judge Wilkinson explained in *S-1*, however, the "voluntary change in conduct" language in *Hewitt* does not necessarily "extend the ways to attain prevailing party status beyond the three situations later listed in *Farrar*." 6 F.3d at

171. Rather, "*Farrar*'s inclusion of settlements between parties encompasses both monetary settlements and agreements to a change in conduct." *Id.* While a plaintiff who secures either will have prevailed without a formal judgment, "a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party...." *Id.*

While petitioners and their *amici* point out that other federal courts of appeals have disagreed with this application of *Farrar*, some of these decisions contain no analysis whatsoever, and merely recite that the catalyst theory remains viable. *See, e.g., Little Rock School District v. Pulaski County Special School District*, 17 F.3d 260, 263 n.2 (8th Cir.1994). Some cases rely on *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir.1978), as the "seminal" catalyst theory case, but ignore that *Nadeau* actually used the catalyst theory to determine whether a party who had a court-enforceable consent decree was the prevailing party because he had been the catalyst to the settlement. *Id.* at 279.

Moreover, a close reading of many of the other cases cited reveals that the court of appeals' analysis and application of prevailing party law in this case is not substantially different from that of many other circuits but rather represents more a difference of semantics than substance. Although the Second Circuit explicitly retained the catalyst test in *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir.1995), the same court several months later in *Association for Retarded Citizens of Connecticut v. Thorne*, 68 F.3d 547 (2nd Cir.1995), ignored *Marbley* and observed that "[r]ecent Supreme Court cases have stated that the key to determining whether a party prevails is whether the litigation resulted in an alteration of the legal relationship between the parties. The 'plaintiff must obtain an enforceable judgment against the defendant from whom

fees are sought . . . or comparable relief through a consent decree or settlement.'" 68 F.3d at 552 (quoting *Farrar*, 506 U.S. at 111) (ellipsis in original) (other citations omitted). The court concluded that no such change in legal relationship had occurred, but held that, in any case, the lower court no longer had subject matter jurisdiction. *Assn. for Retarded Citizens*, 68 F.3d at 552.

Likewise, although the Seventh Circuit in *Zinn v. Shalala*, 35 F.3d 273 (7th Cir.1994), explicitly retained the catalyst theory, the same circuit in *Board of Education of Downers Grove Grade School v. Steven L.*, 89 F.3d 464 (7th Cir.1996), held that the plaintiff could not be considered to have substantially prevailed because the outcome of the suit had resulted in no enforceable obligation on the part of the school district, and no relief was in the form of a judgment or enforceable settlement. *Id.* at 468.

Similarly, the Fifth Circuit stated in *Foreman v. Dallas County, Texas*, 193 F.3d 314 (5th Cir.1999), *cert. denied*, 120 S.Ct. 1673 (2000), that it had never fully explored the impact of *Farrar* on the viability of the catalyst theory and that it had never addressed the issue directly. 193 F.3d at 320. The court observed that *Farrar* places "the continuing validity of the catalyst theory in serious doubt," *id.*, as its language "strongly suggests that the plaintiff must obtain some merits-based relief which alters its legal standing with the defendant before it may claim prevailing party status." *Id.* However, the court declined to "engage in that close debate," *id.*, holding that, if the catalyst theory still applies, the facts did not support a finding that the plaintiff had either obtained the relief he sought by the legislative change that ended the case, or proved that he was the cause of that change. *Id.* at 320-21. The court in *Craig v. Gregg County*, 988 F.2d 18 (5th Cir.1993), also questioned whether the catalyst theory was still good law, but reached no resolution because the plaintiff had not shown causation in any event.

The Fifth Circuit has thus never spoken definitively on the issue.

In some of the cases cited by petitioners, there existed a judgment, consent decree, or settlement agreement that supported the attorneys' fee request. *See Kilgour v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir.1995) ("Kilgour obtained an enforceable stipulated judgment requiring the City to make substantial modifications to the Rose Bowl press box."); *Beard v. Teska*, 31 F.3d 942, 944 (10th Cir.1994) ("In June 1990 the plaintiff class, Departments and Sand Springs entered into a Settlement Agreement under which the Education Department assumed the responsibility. . . ."). [1] As this Court has explicitly recognized, such relief establishes prevailing party status. *See Farrar*, 506 U.S. at 111; *Maher v. Gagne*, 448 U.S. 122, 128 (1980). The prevailing party standard that the court of appeals applied in this case is entirely consistent with cases such as these, in which the courts merely applied the catalyst theory to determine whether the plaintiff's efforts were causally related to the relief obtained in the litigation.

Thus, the rule of law applied by the Fourth Circuit to determine prevailing party status is not substantively different from that applied by this Court and a number of lower court decisions cited by petitioners and their *amici*.

---

[1] Attorneys' fees were also denied in several of the cases that petitioners claim continue to recognize the catalyst theory. *See Payne v. Board of Education*, 88 F.3d 392, 399-400 (6th Cir.1996); *Brown v. Local 58, Int'l Brotherhood of Electrical Workers*, 76 F.3d 762, 771-73 (6th Cir. 1996); *American Council of the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 251 (10th Cir.), *cert. denied*, 510 U.S. 864 (1993).

B. The Court Of Appeals' Decision Is Not Contrary To The Legislative History Or Policies Of Fee-Shifting Statutes.

Nor does the standard applied by the court of appeals contravene either the legislative history underlying attorneys' fee legislation or the policies upon which that legislation is based. Evidence regarding congressional intent to define "prevailing party" is not extensive. Petitioners and their *amici* place heavy reliance on one sentence in a congressional report, which cites to earlier cases: "Moreover for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir.1975), and cases cited therein [*Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469 (2nd Cir.1968); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2nd Cir.1964); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir.1970), *cert. den.*, 401 U.S. 911 (1971)]; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir.1970); *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore.1969); *Thomas v. Honeybrook Mines, Inc.* [*supra*]; *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975)." S.Rep. No. 1011, 94th Cong., 2nd Sess. at 5 (1976). *See also* H.R. Rep. No. 1558, 2nd Sess. at 7 (1976).[2] The phrase "without formally obtaining relief" is not further explicated, except by citation to the cases. None of these

---

[2] *Maher v. Gagne* cites to this language for the proposition that a party may prevail through a settlement as well as through litigation, but the settlement in *Maher* resulted in the entry of a court-enforceable consent decree. *See* 448 U.S. at 129.

cases extends the concept of "informal relief" to include a voluntary change in behavior on the part of the defendant that does not alter the legal relationship between the parties, is not legally enforceable, and is unaccompanied by any judicial finding or admission that federal law has been violated.

Kopet and the cases cited there, including *Honeybrook Mines*, do not involve attorneys' fees collected from a wrongdoer at all. Rather, they involve variations of the "common fund" doctrine, in which a litigant or lawyer who recovers a common fund for the benefit of others is entitled to a reasonable attorneys' fee from the fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 477 (1980) (citing cases). *Kopet, Blau*, and *Gilson* dealt with the rule under the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), that allows a stockholder to obtain compensation for counsel fees from a corporation that has succeeded in obtaining recovery of profits by insiders in litigation brought by the stockholder or by the corporation at the stockholder's behest. *Kopet* extended this rule to situations in which the corporation has obtained substantial non-monetary benefits from the litigation. *Honeybrook* concerned a variant of the common fund doctrine and involved the actions of an intervenor that forced the trustee-plaintiffs to bring suits that were successful in obtaining recovery. The court held that the intervenor's counsel fees should be paid by the trustee-plaintiffs from the resulting fund.

While *Parham* and *Richards* involved suits brought against alleged violators of federal law, the courts in both cases held that the employer-defendants had violated anti-discrimination laws. On that basis, the courts held that the plaintiffs were entitled to attorneys' fees, even though they had obtained neither damages nor injunctive relief. *See Parham*, 433 F.2d at 428-30; *Richards*, 300 F.Supp. at 340-

41. The court in *Parham* also instructed the district court to retain jurisdiction to assure continuation of an anti-discrimination policy. 433 F.2d at 429. Although the employers had changed their policies after the suits were filed, that factor was considered by the courts only as a reason to withhold injunctive relief. Neither of these decisions supports the award of fees in a case such as this, and it is questionable whether they could withstand this Court's subsequent attorneys' fees decisions in *Hewitt* and *Rhodes* because neither plaintiff received any relief on the merits that affected the behavior of the defendant toward the plaintiff.

The last case cited, *Aspira,* merely confirmed that plaintiffs who had obtained a long, detailed consent decree providing concrete remedies for violations of constitutional and statutory provisions were prevailing parties. In sum, none of the cases cited by Congress supports the broad prevailing party standard petitioners and their *amici* seek.

More general language in the same congressional reports lend support to the proposition that in civil rights cases, as opposed to common fund cases, "when a district court awards counsel fees to a plaintiff, it is awarding them against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). Fees are necessary, for example, to ensure that "those who violate the Nation's fundamental laws are not to proceed with impunity," S.Rep. No. 1011, 94th Cong., 2nd Sess. at 2, and thus are "an integral part of the remedy necessary to achieve compliance with our statutory policies" that have enabled "vigorous enforcement of modern civil rights legislation." *Id.* at 3, 4. Fees also ensure that "private attorneys general" will not be deterred from bringing actions "to vindicate the fundamental rights here involved," *id.* at 5; are incident to "securing compliance with these laws," *id.*; and are "part of the remedies necessary to obtain such compliance." *Id.*

Nothing in this legislative history suggests that Congress intended attorneys' fees to attach when no change in the parties' legal relationship occurred in the litigation and no finding or admission of any civil rights violation has ever been made. The core purpose of the "private attorney general" theory endorsed by Congress is the enforcement of important civil rights laws. The rule applied by the court of appeals in this case directly advances that purpose at the same time it discourages plaintiffs in actions such as this, in which no violation of federal law has been found to exist, from collecting fees for pursuing their "private vision of the public good." *S-1*, 6 F.3d at 172 (Wilkinson, J., dissenting).

Conversely, as Judge Wilkinson observed in *S-1*, the catalyst theory discourages public officials from "taking initiatives to revise outmoded ordinances or to improve institutional conditions" because "the catalyst theory empowers courts to award fees for *any* change in behavior that occurs after the filing of a lawsuit, whether or not the court could have ordered that change in conduct." 6 F.3d at 172 (emphasis in original). Such an award not only directly contravenes this Court's express recognition that fee responsibility and liability on the merits "go hand in hand," *Kentucky v. Graham*, 473 U.S. at 165, but it also "serves to disable public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees." *S-1,* 6 F.3d at 172. Government officials should not be either deterred from or penalized for carrying out their responsibilities by the threat of attorneys' fee liability and the considerable litigation that typically is necessary to establish that liability.

The adverse impact that such litigation would have on the operation of government cannot be overstated. If parties such as petitioners can be considered prevailing parties, notwithstanding the absence of a judgment, consent decree,

or enforceable settlement agreement, discovery can be expected to include depositions of West Virginia legislators seeking their reasons for repealing the self-preservation requirement previously at issue in this case. Such discovery is not likely to lead to any admissible evidence. Indeed, "the legislative process is fraught with compromises, competing concerns, and unspoken motives," *Foreman v. Dallas County*, 193 F.3d at 321, and so it is speculative at best that the motivations of a legislative body in passing a law can be either parsed so cleanly or even gleaned from the testimony of any individual legislator.

More fundamentally, however, "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. at 437, which would be exactly the result of forcing the legislative branch of State government to provide a federal court with a specific explanation of the reasons underlying the exercise of its law-making authority. It is difficult to envision a greater intrusion by a federal court on such a fundamental power of a State legislature. This encroachment serves no public purpose, aids no goal of enforcing civil rights laws, and runs afoul of the settled principle that "it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (quoting *Tenny v. Brandhove*, 341 U.S. 367, 377 (1951)).

All citizens of this country, of course, are entitled to seek vindication of their rights from any branch of our democratic system of government, but an individual does not become a prevailing party in litigation entitled to attorneys' fees when, as a result of the political rather than judicial process, that relief is secured through the legislative or executive branches from government officials and entities that often are not even parties to the litigation. This does not contravene any fee-shifting policy but simply

reflects the choices that are often available to aggrieved individuals, as issues that are deemed legal in a judicial proceeding are also frequently treated as political. While courts represent one mechanism for addressing those issues, other branches of government in many instances are, as this case illustrates, the fora best equipped for establishing solutions for the difficult and complicated public policy questions that arise when institutional change is sought.

As set forth in petitioners' brief, this case "pitted the concept of 'aging in place' in a residential care home setting against fire safety concerns of the State." Br. at 4. The origins of that dispute were part of a debate that "was not unique to West Virginia" but rather "started on a national level when the National Fire Protection Association (NFPA) developed its 1985 Life Safety Code, to address the fire safety needs of residential care homes." *Id.* As a result of this debate, which apparently was fueled by a national survey showing that "a majority of states had abandoned the concept of self-preservation for residential care homes," *id.* at 5-6, the West Virginia legislature enacted two bills "related to amendments to the State Fire Code" and "the self-preservation provisions in W.Va. §§ 16-5H-1." Br. at 8 n.4. The enactment of these bills resulted in the elimination of the self-preservation requirement that petitioners contested and resolved the issues they raised in this case.

Petitioners are certainly allowed to ask elected officials to provide them with this type of relief, but they are not entitled to attorneys' fees when they are successful in doing so. Rather, attorneys' fees are appropriate only when the benefits sought are conferred through litigation, by way of a judgment, consent decree, or enforceable settlement agreement. Fee-shifting statutes are not designed to reward citizens for their lobbying efforts.

The court of appeals thus committed no error in concluding that an award of attorneys' fees is inappropriate in this case. Even if this Court holds, however, that a change in law or regulation can establish, by itself, prevailing party status, that does not provide a reason for overruling the standard established in *S-1*. Such a change may provide a fourth route for obtaining fees, but it should not call into question the court of appeals' requirement that no fees are otherwise available absent one of the three criteria set forth in *Farrar*.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MAUREEN M. DOVE
ANDREW H. BAIDA*
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Counsel for *Amici* States

**Counsel of Record*

December 20, 2000